



Affiliated Tribes of Northwest Indians

Economic Development Corporation

September 4, 2006

Mr. Darryl Francois
Attn: 1813 ROW Study
Office of Indian Energy and Economic Development
1849 C. St. NW, Mail Stop 2749-MIB
Washington, DC 20240

Mr. David Meyer
Attn: 1813 ROW Study
Office of Electricity Delivery and Energy Reliability
Department of Energy
1000 Independence Ave, SW
Washington, DC 20585

Dear Sirs,

Please allow this letter to serve as written comments of the Affiliated Tribes of Northwest Indians Economic Development Corporation (ATNI-EDC) on the “Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study” issued on August 8, 2006 by the U.S. Department of Energy and U.S. Department of Interior. ATNI-EDC would like to address a number of topics, generally in order of their appearance in the report. A few general comments are included first:

Time

The time to review and comment on the study and to plan for and attend public meetings has been insufficient to fully address all issues and concerns.

Executive Summary

No draft Executive Summary has been provided for review and comment by the parties interested in this study. Because the Executive Summary will likely be most widely read portion of the study, we feel that in fairness to all parties, the Departments should not now include an Executive Summary in the report.

Trust Responsibility

The trust responsibility is acknowledged by both Department of Interior and the Department of Energy, and by the President of the United States. The Departments are always bound by this duty of trust, even when asked by Congress to provide them

recommendations. If Congress had wished for recommendations that were not bound by trust, Congress could have asked a neutral third party to undertake this study and its recommendations.

A set of Tribal Principles has been considered and adopted by numerous tribes and tribal organizations, including the Affiliated Tribes of Northwest Indians, and are available in the record. In our earlier comments we included the following discussion:

The Departments of Energy and Interior are trustees of tribal resources, including tribal lands as they may be used for energy rights of ways. As trustees with decision making authorities over these precious tribal resources, the Departments of Energy and Interior owe a fiduciary duty to tribes *to act in the best interests of the tribes*. To assist our trustees in understanding the best interests of tribes, representatives from a number of tribes drafted and finalized a set of Principles which should govern the considerations of the Departments of Energy and Interior. *We view a breach of these Principles as a breach of the federal trust responsibility and a breach of a number of Tribal Treaties that are described by various tribes that are parties to those treaties with the United States of America.*

Those Principles are as follows:

INDIAN TRIBES – PARTNERS IN AMERICA’S ENERGY FUTURE

SECTION 1813 RIGHT-OF-WAY STUDY – TRIBAL PRINCIPLES

1. **Tribal Sovereignty and Consent.** The power of tribes to prevent third parties from using tribal lands without tribal consent is a critical element of tribal sovereignty that has been established in Federal law and policy for over 200 years. The tribal consent requirement to the use of tribal lands should be honored and preserved.
2. **Conditions to Consent.** The tribal consent requirement includes the power of tribes to place conditions on the use of tribal lands, including conditions related to tribal jurisdiction, preservation of environmental and cultural resources, duration of use, and compensation.
3. **No Negative Effects.** Adherence to the tribal consent requirement has resulted in greater energy production in Indian country and lower energy costs to consumers. The tribal consent requirement for rights-of-way has not had a noticeable negative effect on the availability or cost of energy to consumers.
4. **Preservation of Tribal Jurisdiction.** No right-of-way agreement or other business arrangement that permits third-party use of tribal land should reduce the sovereign power of a tribe over its lands or the activities conducted on its lands in the absence of the specific consent of the tribe.
5. **Restricted Duration of Rights-of-Way.** Federal law and policy should not be changed to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.

6. **Negotiated Compensation.** Tribes should continue to have the right to negotiate compensation for the use of tribal land that gives tribes a fair share of the economic benefits produced by use of their lands. Such revenues sustain tribal governments and cultures.
7. **National Security.** Indian nations are an integral component of energy security of the United States, not a threat to that security. History demonstrates that tribes have permitted critical energy facilities to be used pending compensation negotiations even in cases where tribal rights-of-way have expired.
8. **Industry Partnerships – Best Practices.** Federal law and policy should provide positive incentives to tribes and industry to foster partnerships and the mutual alignment of economic interests related to energy development, transmission and distribution.
9. **Appropriate Deference.** As reflected in the Indian Tribal Energy Development and Self Determination Act of 2005, deference to tribal decision-making should remain a fundamental component of Federal Indian energy policy.
10. **Allottee Experience.** The creation of a Federal administrative valuation process for fixing tribal right-of-way compensation would be an affront to tribal sovereignty and, as shown by the disastrous Federal management of Indian allottee resources, would be a mistake.

Don't "Fix" What Isn't Broken

The study's conclusions are generally buried in the report and should be moved to a more prominent place in the report. These conclusions include,

- Section 3 page 15 "...the Departments have seen no evidence that tribal consent would be an issue in an emergency situation..."
- Section 4.2 page 23 - "The Departments note, however, that most energy ROW negotiations are completed successfully. This is true even if the negotiations are protracted and the method for determining the value of the energy ROW results in compensation that sometimes greatly exceeds the market value of the tribal lands involved."
- Section 4.3 page 24 – regarding the "public interest perspective" "Although the issue is significant for the parties, it does not appear to be consequential for the nation or consumers in general for at least four reasons..."
- Section 4.3 page 25 – "Energy companies that built productive relationships and partnerships with tribes commented that they find tribes to be fair negotiators for energy ROW valuation on tribal lands."

The report should not include "options" or "recommendations that are inconsistent with these conclusions.

Treaties

The statutory background, and the tone of the rest of the report, leaves out all but a brief mention of treaties, which are legal documents directly impacting federal authorities. Any analysis of statutory and regulatory foundations of Indian law or the law of Indian right of ways must include a discussion of treaties and the context those treaties

place on legal structures. Explanations and descriptions of many individual treaties were included in many of the tribal comments.

Options

Rather than following the plain language of 1813 and making “recommendations”, which would have to have been consistent with the Department’s federal trust responsibility, the Departments chose to describe “options” which, if chosen, would be breaches of the trust responsibility. These options were included “to avert concerns that could arise”. Until these issues arise, options to resolve them are only responding to industry scare tactics. Further, any option that is not consistent with the conclusions of the study or with treaties or trust responsibilities must be stricken from the study. Any bill that seeks to implement Options c, d or e, could be appropriately titled “An Act to Breach Indian Treaties for the Benefit of Energy Company Profits”. Many of the options are “win-lose” options, and very few are “win-win” for tribes and industry. Such a win-win option is to encourage tribe and industry to work better together to form long term and creative partnerships that encompass issues broader in scope than right of way matters. We also note that there are no options or recommendations which are directed at improving BIA real property records or processes.

Unique Nature of Each Tribe

Not only does each tribe have a different cultural history, but tribes have different legal backgrounds and geological and geographical practicalities. While this is inconvenient for policy makers and industry groups trying to deal with tribes as a bunch, it is reality and can not and should not be glossed over. Just as it would be nonsense and fatal for the United States Department of State to deal with Iraq the same and Japan, and Sudan the same as Britain under the same strategies and policies, it is also inappropriate for the Departments of Energy and Interior to deal with all tribes under the same strategies and policy. Just as industry does not deal with industrial customers the same as residential customers and the City of Los Angeles the same as a small irrigation district, using the same negotiation, marketing and other strategies, they should not deal with all tribes under the same policies and strategies. A successful company will get to know each tribe that they wish to do business with in order to understand their particular legal backgrounds, histories, laws, and needs. Trying to make one policy or “option” for all tribes will never create a successful strategy.

Specific Sections of the Study

- ❖ 1.3.3 Describes concerns over increasing negotiation periods. There is no description of the Bureau of Indian Affairs’ role in or responsibility for negotiation problems.
- ❖ 1.3.4 Describes a lack of uniform and measurable standard for valuing Indian rights of ways. A description of the legitimate reason for this lack of uniformity, the unique nature of various tribal lands and legal structures, is wholly inadequate.
- ❖ 1.3.5 describes tribes discouraging investment in facilities – this is each tribe’s choice and tribes know how to discourage or encourage industries by partnerships or developing good business climates.

- ❖ 1.3.6. The potential for “curtailing” facilities in trespass should be deleted from the report as it has not happened and numerous cases of trespass and eventual settlement of trespass situations are on record.
- ❖ 1.3.7 Regarding costs to consumers should have the last paragraph regarding possible cost increases due to potential trespass damages deleted. As stated in the report, these “fears” are totally unsubstantiated by verifiable information or actual instances of the problem.
- ❖ 1.3.8 Standards for Valuing – The detailed description of standards for valuing tribal lands should include comments from the record that tribal lands are not comparable to those lands which are not subject to treaties and tribal law. Tribal lands are not even comparable to other tribal lands. In addition, tribes are governments and not private citizens. These points are not given enough weight.
- ❖ 3.2.1 Emergency Authorities- What are these “authorities” and do tribes agree that they are appropriate back-stops?
- ❖ 3.2.2 “Executive Branch Policies” fails to mention the Department of Energy Tribal Policy, the Federal Energy Regulatory Commission’s Tribal Policy.
- ❖ 4.1 The valuation methods included in the study include many methods that are wholly irrelevant to the study of Indian lands, and should be excluded, or should be followed by an explanation why they are not applicable to tribal lands. Other valuation methods which are appropriate to tribal lands, such as those found in the Federal Power Act for dam relicensing, is not included.
- ❖ 4.2 The statement at the bottom of page 20 “Tribal parties rejected those principles as inappropriate for tribal lands” should go on to describe why this is so or it is not a fair summary. The sentence in the middle of page 21, “Industry parties frequently commented, however that current valuation of many energy ROWs on tribal lands far exceeds the market values of those lands and appears to include the added value of the energy development” should be followed up with statement that it is clear there is no “market value” of the lands because the lands are legally inalienable.
- ❖ 5.1 Should mention and describe conclusions in the previous report to congress which is excellent background.

Thank you for this opportunity to provide these comments. Please direct any questions to Margaret Schaff, at 303-443-0182.

Sincerely,

Margaret M Schaff

Margaret M. Schaff
Energy Policy Analyst